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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY ESPOSITO, Plaintiff, **v.** **D. KHATRI, M.D.; C. COOK, AGPA; DR. AYMAR; T.H. CALVIN, JR., M.D.,** Defendants.	08CV0742 H WMc **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS KHATRI AND COOK'S MOTION TO DISMISS** [Fed. Rule Civ. Proc. 12(b)(6)] Hearing: October 3, 2008 Time: 9:00 a.m. Courtroom: C Judge: Hon. William McCurine, Jr.

I. INTRODUCTION

In order to state a claim for relief under the Eighth Amendment based on allegations relating to the deprivation of medical care, a plaintiff must prove that the defendant acted with deliberate indifference toward the plaintiff's medical needs. Phrased differently, the plaintiff must demonstrate that the individual defendant purposefully ignored his or her medical needs. Plaintiff Anthony Esposito, a pro per inmate incarcerated at Centinela State Prison, cannot meet this burden with respect to the moving Defendants. The complaint and its exhibits establish that

Defendant Khatri examined Plaintiff and repeatedly referred Plaintiff for evaluation and epidural injections by a neurosurgeon. With respect to Defendant Cook, who is not a medical professional, the complaint and exhibits reveal that Ms. Cook confirmed Plaintiff was under the care of several physicians, reviewed medical records indicating Plaintiff received MRIs and physical therapy, and noted Plaintiff was scheduled to receive spinal facet blocks consistent with the recommendations of the neurosurgeon. Plaintiff fails to allege facts indicating that neither Defendants acted with deliberate indifference toward Plaintiff's medical needs.

Additionally, Plaintiff failed to exhaust his administrative remedies with respect to some of his Eighth Amendment claims. Pursuant to the Prison Litigation Reform Act of 1995, the unexhausted claims must be dismissed.

II. SUMMARY OF ALLEGATIONS AND COMPLAINT EXHIBITS

Plaintiff alleges he underwent an MRI on November 6, 2007, which revealed "mild degenerative changes of the dorsal spine." (Compl. ¶ 2.) On December 26, 2006, a second MRI indicated signs of "spinal stenosis" throughout Plaintiff's spine. (Compl. ¶ 3.)

On March 15, 2007, Defendant D. Khatri, M.D., requested Plaintiff's temporary removal from the prison for the purpose of being evaluated by a neurosurgeon. (Compl. ¶ 5, Compl. Ex. A, p. 31.) Plaintiff was evaluated by Dr. Calvin, a neurosurgeon, on May 10, 2007. Dr. Calvin's report included a recommendation that Plaintiff participate in physical therapy. (Compl. Ex. A, p. 32.) A request for physical therapy by the institution's medical staff was made on May 11, 2007. (Compl. Ex. A, unnumbered document following p. 19, entitled "Physician Request For Service (RFS)".) On June 20, 2007, Dr. Aymar submitted another request to have Plaintiff participate in physical therapy within 30 days. (Compl. Ex. A, p. 32.)

On July 5, 2007, Dr. Khatri referred Plaintiff to Dr. Calvin for a follow-up appointment. (Compl. ¶ 7; Compl. Ex. A, p. 27.) On August 2, 2007, Dr. Calvin re-evaluated Plaintiff and prepared a written report detailing his findings and setting forth several recommendations. (Compl. ¶ 9; Compl. Ex. A, pp. 21-25.) Dr. Calvin recommended that spinal facet blocks be performed on portions of Plaintiff's cervical spine. Dr. Calvin also recommended that Plaintiff discontinue weight lifting and vigorous exercise. (Compl. Ex. A, pp. 24-25.) Although Dr.

Calvin recommended that Plaintiff participate in a walking program, the August 2, 2007 report did not mention the need for physical therapy. (Compl. Ex. A, pp. 24-25.) Dr. Calvin further requested that he be allowed to reevaluate Plaintiff after Plaintiff underwent additional x-rays and MRIs. (Compl. Ex. A, pp. 24-25.)

On July 10, 2007, prior to Dr. Calvin's August 2 report, Plaintiff submitted a grievance based on the Department of Corrections and Rehabilitation's failure to provide him with physical therapy. On July 20, 2007, Defendant C. Cook, the Health Care Appeals Coordinator at Centinela State Prison, provided a initial response to Plaintiff's grievance, acknowledging that Plaintiff was referred to physical therapy on May 10 but that the institution was experiencing difficulty securing that service. (Compl. Ex. A, p. 3.) On September 11, 2007, Ms. Cook and Dr. Khatri acknowledged that they were still attempting to secure a physical therapist for Plaintiff. (Compl. Ex. A, p. 5.)

On October 6, 2007, Plaintiff received a consultation with a physical therapist. (Compl. Ex. A, unnumbered document following page 19, entitled "Physician Request For Service (RFS)".) The therapist noted Plaintiff's reports of pain and range of motion and concluded that the "affect of PT may be limited." (Compl. Ex. A, unnumbered document following p. 19, entitled "Physician Request For Service (RFS)".) Based on a review of Plaintiff's medical records, Ms. Cook responded to Plaintiff's grievance on October 27, 2007, by noting that his medical records indicated that he had received physical therapy and instruction on a self-exercise program. (Compl. Ex. A, p. 6.)[1/]

In October 2007, Dr. Khatri referred Plaintiff to Dr. Calvin for reevaluation of his condition. (Compl. ¶ 12.) Dr. Calvin reviewed an MRI of Plaintiff's spine taken in late September and re-examined Plaintiff on October 25, 2007. Dr. Calvin did not recommend additional physical therapy. (Compl. Ex. A, pp. 13-14.)

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1. In the text of his complaint Plaintiff alleges that he did not receive physical therapy on October 6, 2007. However, the exhibit attached to the complaint includes a request for physical therapy services. The bottom portion of this form, upon which Ms. Cook relied, reflects that the consultation took place on October 6, 2007 and it contains progress notes written by the consultant. (Compl. Ex. A, unnumbered document following p. 19, entitled "Physician Request For Service (RFS)".)

In December 2007, Dr. Khatri submitted referrals to have Plaintiff treated with epidural injections at Pioneer Hospital. (Compl. ¶ 13; Compl. Ex. A, pp. 11-12.)

On February 7, 2008, Plaintiff exhausted his administrative remedies with respect to his request for physical therapy services when the Department rendered its "Director's Level Appeal Decision." (Compl. ¶ 1.) Notably, however, Plaintiff administrative appeal focused solely on the a demand for physical therapy services. (Compl. Ex. A, pp. 1-6.)

III. ARGUMENT

A. Dr. Khatri and Ms. Cook Did Not Act With Deliberate Indifference Toward Plaintiff's Medical Needs

Deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 102-104 (1976). To succeed on a claim of deprivation of medical care in violation of the Eighth Amendment, a plaintiff must prove that the defendant was deliberately indifferent to his serious medical needs. *McGuckin v. Smith*, 974 F.2d 1050, 1059, 1060, (9th Cir.1992), *overruled on other grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.1997) (en banc). There is both an objective *and* subjective component for a viable claim of deliberate indifference. The plaintiff must demonstrate that (1) he suffered from an objectively serious medical need and (2) that the prison official actually knew of but deliberately disregarded his need. *Id*; *Clement v. Gomez,* 298 F.3d 898, 904 (9th Cir. 2002).

The subjective component of the deliberate indifference standard is particularly onerous. It is established when a prison official acted with the requisite culpable state of mind, i.e., he "knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it." *Wilson v. Seiter*, 501 U.S. 294, 299, 111 S.Ct. 2321 (1991). A defendant must purposefully ignore or fail to respond to a prisoner's pain or medical need in order to establish deliberate indifference. *McGuckin v. Smith, supra*, 974 F.2d at 1060. As the Supreme Court clarified in *Wilson*, "only the unnecessary *and wanton* infliction of pain implicates the Eighth Amendment." *Wilson,* 501 U.S. 294.

Mere negligence or medical malpractice is insufficient to establish deliberate indifference. *Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir.2004); *McGuckin*, 974 F.2d at 1059 (mere negligence in diagnosing *or treating* a medical condition without more, does not violate a prisoner's Eighth Amendment rights). Inadequate treatment due to malpractice, or even gross negligence, does not amount to a constitutional violation cognizable under section 1983. (*Estelle v. Gamble*, *supra*, 429 U.S. at 106; *Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir.2004); *McGuckin*, 974 F.2d at 1059; *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).)

Here, Plaintiff complains that he suffered from a serious medical condition and that Defendants violated his Eighth Amendment rights by delaying his access to Eighth Amendment rights. However, a delay in providing medical treatment is actionable under the Eighth Amendment only if it is occasioned by "deliberate indifference which results in substantial harm." *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir.1993); *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir.1993). The medical records contained in an Exhibit A to the Complaint establish that Plaintiff cannot prove that Dr. Khatri acted with deliberate indifference toward his medical needs. Dr. Khatri insured that Plaintiff was evaluated by a qualified specialist, submitted and approved referrals for Plaintiff's follow-up evaluations with Dr. Calvin, and submitted referrals for Plaintiff to receive epidural injections. Any delay in securing physical therapy services for Plaintiff was not caused by Dr. Khatri's deliberate indifference; Dr. Khatri did not purposefully ignore Plaintiff's medical needs.

Similarly, Plaintiff cannot establish an Eighth Amendment claim against Ms. Cook. Ms. Cook was the Health Care Appeals Coordinator responsible for responding to inmate grievances; she was not responsible for providing Plaintiff medical care. In response to Plaintiff's grievance, she reviewed Plaintiff's medical file and consulted with health care administrators. Ms. Cook confirmed that Plaintiff was under the care of several physicians and that he received a physical therapy consultation. Plaintiff cannot establish that the delay in securing physical therapy services was due to the deliberate indifference of Ms. Cook.

Further, as noted above, a delay in the provision of medical care implicates the Eighth Amendment only if it results in substantial harm. Here, Dr. Calvin initially recommended physical therapy on May 10, 2007. In subsequent written reports on August 2 and October 25, however, Dr. Calvin did not mention the need for physical therapy and advised Plaintiff to limit his physical activities. Additionally, the medical records attached to the complaint indicate that when Plaintiff was evaluated by a physical therapist on October 6, 2007, the physical therapist opined that the "affect of PT may be limited." Given these facts, Plaintiff cannot establish that the approximate five month delay in receiving a consultation with a physical therapist caused Plaintiff substantial harm.

Based on the forgoing, Defendants Khatri and Cook respectfully move for dismissal based on Plaintiff's failure to state a claim against them.

B. Plaintiff's Unexhausted Eighth Amendment Claims Must Be Dismissed

The Prison Litigation Reform Act of 1995, expressed in part at 42 U.S.C. section 1997e, requires a prisoner to exhaust his or her administrative remedies before suing over prison conditions. *Porter v. Nussle,* 534 U.S. 516, 525, 152 L.Ed.2d 12 (2002); *Booth v. Churner,* 532 U.S. 731, 739, 149 L.Ed.2d 958 (2001). In order to satisfy the exhaustion requirement, the prisoner must complete each step within the prison's administrative process. *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002). Section 1997e requires a prisoner to exhaust the prison's administrative remedies, by completing the entire administrative process, prior to the filing of a complaint. *McKinney v. Carey*, 311 F.3d 1198, 1199-1200 (9th Cir. 2002); *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999).

Concerning the situation where an inmate exhausts his administrative remedies with respect to some but not all of his claims, the Supreme Court recently declared"[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock,* 127 S.Ct. 910, 919, 127 S.Ct. 910 (2007). In *Jones v. Bock,* a trial court dismissed the suits by several plaintiffs, in their entirety, after concluding that the plaintiffs exhausted their administrative remedies with respect to only some but not all of the claims contained in their suits. The Supreme Court reversed, concluding that trial courts must distinguish between the exhausted and unexhausted claims and only dismiss the portions of the suit for which the plaintiff did not exhaust his remedies. *Jones*,127 S.Ct.at 923-926.

In the instant case, Plaintiff exhausted his administrative remedies with respect to the claim that Defendants violated his Eighth Amendment rights by failing to secure physical therapy services. However, Plaintiff did not file an appeal with respect to claims that Defendants violated his rights by delaying other medical services. The only issue presented in Plaintiff's inmate appeal, and the only issue addressed by prison officials, pertained to the delay and purported refusal of the Department of Corrections and Rehabilitation to provide Plaintiff with physical therapy. (Compl. Ex. A, pp. 1-6.) Following *Jones v. Bock*, all other remaining claims contained in the instant suit, such as the failure to provide Plaintiff with other services, should be dismissed.

IV. CONCLUSION

Plaintiff fails to state a claim under the Eighth Amendment against Defendants Khatri or Cook. Based on the records attached to Plaintiff's complaint, it is clear that the delay in securing physical therapy service was not occasioned by moving Defendants' deliberate indifference. Additionally, Plaintiff did not exhaust his administrative remedies with respect to any other claims that may be gleaned from the complaint.

Dated: August 26, 2008

Respectfully submitted,

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